

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISC. CIVIL APPLICATION No. 04 OF 2022

**ALFRED NDOMBA MAGANGA (Legal Representative of the Late JEROME
ALBERT MAGANGA)APPLICANT**

VERSUS

TANZANIA COMMERCIAL BANK PLC.....1ST RESPONDENT
JULIUS NGAYMA..... 2ND RESPONDENT
TAMBAZA AUCTION MART& GENERAL BROKERS.....3RD RESPONDENT
TULVIN INVESTMENT COMPANY LIMITED.....4TH RESPONDENT
NAMSWEA SECURITY COMPANY LIMITED.....5TH RESPONDENT
ATTORNEY GENERAL6TH RESPONDENT

RULING

Date of last order: 14/07/2022

Date of Ruling: 11/08/2022

U.E. MADEHA, J

The instant application is made under *Order XXXVII Rule 1(a) and (b), Section 68 (c) and 95 of the Civil Procedure Code [Cap 33 Revised Edition 2019], Section 2(3) of the Judicature and Application of Laws [Cap 358 Revised Edition 2019]* and any other enabling provision of the Law. The Applicant prayed for the Mareva injunction against the Respondents.

When the application was called for mention, Mr. Visent Kasale the Applicant's Learned Advocate prayed to withdraw this application because it had not complied with mandatory requirement of ninety (90) days' notice. He further stated that he prays to withdraw the application in order to primarily file the main suit. He contended that when looking at the demand note, ninety days expires on 11th August 2022. Eventually, he prayed that, costs of the case be waived.

Mr. Edigy Mkolwe the Learned Advocate for the first Respondent, Mr Nestory Nyoni Learned Avocate holding brief for Advocate Eliseus Ndunguru for the second and third Respondents conceded to Mr. Vicent Kasale, Learned Advocate request of withdrawing the application without costs since there was vividly a procedural illegality.

Following such consensus among the parties' advocates together with my review of the law the sticking question for determination is whether this Court should grant the Applicant's prayer to withdraw the suit with leave to refile. Noteworthy, withdrawal of suits and the considerations for granting the right to refile the suit is governed under the provisions of *Order XXIII of the Civil Procedure Code (supra)*. It states that:

"1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the court is satisfied- (a) that a suit must fail by reason of some formal defect; or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim".

In light of the afore law provisions, a plaintiff is always at liberty to withdraw his suit and the Court's permission is not mandatory. Though, in terms of the sub-rule (3) of the rule, he is liable to pay costs where the reasons for withdraw are not the ones specified under sub-rule 2. Moreover, if he wishes to refile the suit, the applicable provision is sub-rule

(2)(b) of the said Order. Thus, the Court will only grant permission if the conditions set out in paragraph (a) or (b) of sub-rule (2) are met.

In respect to the present matter, it is this Court's finding that the suit was prematurely instituted. This is due to failure to issue ninety (90) days' notice of the intention to sue the sixth Respondent that is the Attorney General as required under *Section 6(2) of the Government Proceeding Act, Cap 5 [Revised Edition 2019]*. The absences of such a notice comprise a defect likely to fall under *Order XXIII Rule 2 (supra)*. Under the circumstances, the suit may be struck out and no order for costs may be issued since the reason for withdraw arises out of the circumstances prescribed under *Rule 2 of Order XIII (supra)*.

Additionally, my perusal of the Applicant's application has revealed that there is no main suit while the same is a request for a temporary injunction. Reference may be made to the case of **ATILIO vs MBOWE** [1967] HCD 124 which succinctly stated the conditions for grant of an injunction. Also see through the case of **CHAVDA vs DIRECTOR OF IMMIGRATION SERVICES** [1995] TLR 125.

Based on the fore goings, I am of the settled view that this application is incompetent. In that regard, it is hereby struck out with no order to the costs. Order accordingly.

DATED at SONGEA this 11th Day of August 2022




U.E. MADEHA

JUDGE

11/08/2022